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No. 90-1506

In The Supreme Court of the United States

October Term, 1990

Kathleen Shetler Globus, Petitioner

v.

Samuel F. Skinner, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Introduction.

The agency's assertion that the Fifth and Seventh Circuit cases we cite[1] do not apply different standards to the reprisal prima facie case than do the D.C. Circuit and Eleventh Circuit cases results from simply misreading the cases. Once the fog of confusion is dissipated, the contrast between the cases is impossible to miss.

Although the agency asserts that the D.C. cases can be squared with *McDonnell Douglas Corp. v. Green*, 411 U.S. 793 (1973), it does not deny that the Fifth and Seventh circuit cases better respect the relative conveniences of production of evidence.

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[1] *Gonzalez v. Carlin*, 907 F.2d 578 (5th Cir. 1990), and *Holland v. Jefferson National Life Ins. Co.*, 883 F.2d 1307 (7th Cir. 1989).

The agency's suggestion that affirmance would be proper on the ground that any prima facie case was rebutted by the agency at trial is wholly without support in the record.

1. Read carefully, the decisions reveal an inter-circuit conflict.

Issue is joined on whether the D.C. circuit's definition of a retaliation prima facie case, *Williams v. Boorstin*, 663 F.2d 109 (D.C.Cir. 1980), conflicts with the definition applied in the Fifth Circuit and Seventh Circuit, *Gonzalez v. Carlin*, 907 F.2d 578 (5th Cir. 1990), and *Holland v. Jefferson National Life Ins. Co.*, 883 F.2d 1307 (7th Cir. 1989). Pet. at 39-42; Opp. at 7.

The parties agree that in the D.C. Circuit (and the Eleventh Circuit) the

elements of a retaliation prima facie case are the same as those of a simple discrimination prima facie case, substituting evidence of protected activity followed by an adverse decision for the element of membership in a protected group. Thus, if the claim is retaliation in failing to select the plaintiff for a particular position, the elements are:

1a) proof of protected activity;

1b) proof of adverse decision;

1c) proof of temporal relation;

2) proof of basic qualifications for job;

3) proof that the job was being filled.

Williams v. *Boorstin*, 663 F.2d 109 (D.C.Cir. 1980); *Mitchell* v. *Baldridge*, 759 F.2d 80 (D.C.Cir. 1985); *Canino* v. *United States EEOC*, 707 F.2d 468 (11th Cir. 1983).

The agency disputes our contention that in *Holland* and *Gonzalez* the courts considered only elements 1a, 1b, and 1c at the prima facie case stage, leaving all possible reasons for the employer's decision to be dealt with at the rebuttal and sur-rebuttal stages. The importance of the question impels the use of care in reading the cases.

The agency summarizes the holding in *Gonzalez* as being that, for lack of qualifications, the plaintiff failed to make out a prima facie case of retaliation. Opp. at 7. The agency simply misreads the decision. The paragraph beginning on the bottom of the left hand column on 907 F.2d 578 concludes that because of "lack of requisite qualifications . . . Gonzalez did not establish a prima facie case

of national origin discrimination."

Then comes a paragraph which assumes that Gonzalez did make out "a prima facie retaliation case," and analyses the qualification evidence as rebutting the presumption created by that prima facie case. (Underlining added in both quotations.):

> Assuming *arguendo* that Gonzalez made out a prima facie retaliation case, the fact that he failed to qualify for the position in question rebutted any presumption of retaliation and constituted a reasonable, nondiscriminatory reason for the Postal Service's rejection of his application. Moreover, we cannot find in the record any evidence demonstrating pretext on the part of the Postal Service.

907 F.2d at 578.

Thus, the agency's assurance to this Court that the *Gonzalez* reprisal prima facie case included more than protected activity followed reasonably shortly by

an adverse decision, resulted from a simple failure to see that the court treated the reprisal and the simple discrimination claims differently.

It is also clear that Mr. Gonzalez would have failed to make a prima facie case of reprisal had his suit been tried by D.C. circuit rules. His failure to prove during his case in chief all the elements of a comparable simple race discrimination prima facie case would have freed the employer from even having to assert the true reason for the adverse decision, and would have barred him from ultimately prevailing by showing that the articulated reason was a mere pretext for reprisal.

The agency's mistake in *Holland* is even more puzzling than its misreading of

Gonzalez. The issue is whether the *Holland* court, like the D.C. Circuit, requires all the elements of a comparable simple discrimination prima facie case to be proven as part of a reprisal prima facie case, or whether it suffices for prima facie purposes to prove protected activity followed shortly by an adverse decision.

Holland involves two different jobs. The agency plausibly construes the claim with respect to the first job as being retaliatory discharge. Opp. 7-8. The prima facie case of simple discriminatory discharge includes proof that the plaintiff was meeting the employer's legitimate performance expectation. *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1409 (7th Cir. 1984). In *Holland*, in contrast, prima

facie reprisal was found without any reference to the quality of the plaintiff's performance, solely on the basis of protected activity followed by adverse decision. 883 F.2d at 1313-6.

The second job at issue in *Holland* was one the plaintiff had never held. She was, in effect, an unsuccessful applicant for it. In a simple discrimination case, or a reprisal case in the D.C. circuit, the plaintiff's prima facie case includes proof that she was qualified for the vacancy. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The *Holland* court did not consider her qualifications when assessing her prima facie case, however; prima facie reprisal was found as with respect to the first position. 883 F.2d at 1313-6. Qualifications were addressed, not as

part of the prima facie case analysis, but in the rebuttal and sur-rebuttal phase. 883 F.2d at 1316.

In sum, the agency errs in denying *Holland* and *Gonzalez* treated only at the rebuttal stage issues which would, under the D.C. and Eleventh Circuit cases, be elements of the reprisal prima facie case.

On the other hand, Ms. Shetler would assuredly made out a prima facie case if judged by the *Holland* or *Gonzalez* courts. Indeed, she not only made out a complete prima facie case of reprisal, she brought into clear focus the question of why the clerical job was not offered her. Among other things, she proved:

* The agency policy was to offer vacancies in lieu of separation (Pet.17);

* The agency offered at least twelve other employees vacancies in lieu of separation (and no hiring freeze exemptions are recorded) (Pet. 23-4);

* Several of the vacancy offers made to other employees were comparable in grade spread to that at issue here (Ibid.);

* The existence of the vacancy was conceded (Pet. 20);

* The vacancy was comparable to the typing job she was offered and she accepted in the 1982 RIF (before the abolition of her job was cancelled)(Pet.8);

* Evidence of Ms. Shetler's typing skills was in her record (App. 21a);

* The only vacancies the agency failed to abolish were those which were high priority positions (App. 54a);

* Neither of the personnel freezes was facially applicable to RIF placements (Pet. 20-2).

There can be no doubt that the *Holland* and *Gonzalez* courts would have, long before this point, placed on the agency the burden of coming forth with a nondiscriminatory explanation for not offering the vacancy to Ms. Shetler.

There is, then, a conflict between the D.C. and Eleventh Circuits, on the one hand, and the Fifth and Seventh Circuits, on the other.[2]

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[2] The agency ambiguously denies that *Klein v. Trustees of Indiana University*, 766 F.2d 275 (7th Cir. 1985), and *Ruggles v. California Polytechnic State University*, 797 F.2d 782 (9th Cir. 1986), "commit those circuits to standards at odds with those applied here." Opp. at 8 n. 4. What the agency appears to mean that twenty-seven years of title VII litigation (eighteen of them since *McDonnell Douglas*) have left the circuits uncommitted as to what standards govern reprisal cases. That is an argument for, not against, this Court using this case to rule (a) whether presumptions can be created in reprisal cases at all and, if so, (b) what the elements of a reprisal prima facie case are.

2. The agency fails to even address the reason presumptions are created or the different effects of various standards, and so cannot argue that the D.C. standard best achieves the objectives of *McDonnell Douglas*.

The lower courts have evolved three different standards for determining the prima facie case of reprisal: that applied in the D.C. and Eleventh circuits, that exemplified by *Gonzalez* and *Holland*, and that exemplified by *Klein v. Trustees of Indiana University*, 766 F.2d 275 (7th Cir. 1985), and *Ruggles v. California Polytechnic State University*, 797 F.2d 782 (9th Cir. 1986). That is to say, on an issue never addressed by this Court, conscientious, competent judges disagree as to which standard best applies the *Mc-*

Donnell Douglas standard to reprisal cases.

The agency argues that if there is an inter-circuit conflict, it should not be resolved, because that the standards applied by the D.C. circuit are consistent with the *McDonnell Douglas* framework, Opp. 7. The agency does not deny, however, that the easier standard we argue for would protect employers from trial in frivolous cases while better respecting the relative conveniences of production of evidence than does the standard the agency argues for.[3] Pet. at 50-63. Indeed, the agency treats as an

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[3] In any event, general consistency with the basic rule is no objection to certiorari review when the cases in conflict also are generally consistent with it. If the D.C. circuit held that proof of nine years unexplained absence was necessary to create a presumption of death, this Court would review the conflict with the seven year cases notwithstanding that the longer unexplained absence is more suggestive of death than the shorter.

irrelevancy the whole question of what objectives are served by the *McDonnell Douglas* prima facie case, and how those objectives can be best achieved in the reprisal category of cases. Since, as the D.C. Circuit has itself acknowledged, "Employees and applicants for employment have great informational disadvantages: they cannot reach into the minds of decision-makers," *Cuddy v. Carmen*, 694 F.2d 853, 856 (D.C. Cir. 1982), this Court should be loath to unnecessarily postpone the point at which the employer is obliged to come forward and reveal what was in the decision-makers' minds.

3. The case for certiorari is not weakened by the agency's unsupported suggestion of alternate grounds for affirmance.

At the very end of its brief, the agency inserts a one-sentence footnote suggesting it would be wasteful to grant certiorari to resolve the prima facie case issue since the district court had found that Ms. Shetler "failed to prove that respondent's reasons for failing to offer her a clerical position were pretextual. See Pet. App. 41a." Opp. at 8 n. 5. As set out in our petition, the agency in fact had not introduced evidence to support the existence of any of the reasons identified by the district court as rebuttal. Pet. 24-27. It is presumably for this reason that the court of appeals limited its affirmance regard-

ing the clerical vacancy "solely on the ground that appellant failed to establish a *prima facie* case concerning availability of such a position." App. 1a-2a. The agency should have followed here the same course it did at the court of appeals: foregoing the defense of the indefensible.

There is nothing in the record of this case which would make it unsuitable as a vehicle for this Court's resolving the conflict over what constitutes a prima facie case of reprisal.[4]

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[4] The agency says at the beginning of its argument that the issue of failure to be offered a vacancy was belatedly injected into the case through Ms. Shetler's motion to alter judgment, Opp. at 4. Since the agency does not specify this as a basis for denying the certiorari petition, we content ourselves with assuring this Court that not only was the wrongful failure to offer her a vacancy alleged in the original complaint, but both parties addressed the issue in their trial briefs and in their arguments over proposed findings of fact and conclusions of law.

CONCLUSION

The writ of certiorari should be issued.

Respectfully submitted,

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